Public Prosecutor v Au Seh Chun

HIGH COURT (MELAKA) — CRIMINAL REVISION NO 43–2 OF 1998
SURIYADI J
4 MAY 1998

Criminal Procedure *— Acquittal or discharge — Discharge of accused not amounting to acquittal — Prosecution had not supplied documents as ordered by court — No evidence that charge was groundless or prosecution not interested in pursuing case — Whether magistrate had power to discharge accused not amounting to acquittal — Whether magistrate should have allowed postponement — Criminal Procedure Code (FMS Cap 6) ss 173(g) & 254*

The accused requested for a discharge not amounting to an acquittal on the ground that the police had not supplied him the documents as ordered by the court. It was not disputed that the prosecuting officer had asked for a postponement on the pretext of giving him time to supply the documents. The magistrate acquiesced to the request of the accused. The issue before the court was whether under the Criminal Procedure Code (FMS Cap 6) ('the Code'), or under any prevailing law, the magistrate may discharge an accused person not amounting to an acquittal in response to the non-adherence of the court's specific instruction by the prosecution, even though there was no indication by the latter of not being interested in pursuing the matter further.

Held, setting aside the order of the magistrate and reinstating the case:

(1) Under s 173(g) of the Code, the court may mete out the order of discharge not amounting to an acquittal if it considers the charge to be groundless. In the present case, the prosecuting officer did not inform the court that he was not interested in pursuing the case; neither was there any evidence to show that the charge was groundless. When a postponement by the Public Prosecutor is requested, without the latter hinting that the charge is groundless or is disinterested in pursuing the case further, the application should be allowed. In this scenario, an order of discharge not amounting to an acquittal is not an alternative order (see pp 186G and 184E).

(2) Article 145(3) of the Federal Constitution provides the Attorney General with power exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence. Article 145(3) is explicit and conclusive in conferring the relevant powers to the Attorney General and it is absurd to think that the magistrate could nonchalantly brush aside the constitutional powers of the Attorney General (see pp 183A, 191C and 192E).

(3) A magistrate does not have the inherent power to discharge an accused not amounting to an acquittal. The English doctrine of inherent jurisdiction is inapplicable in Malaysian subordinate

courts (see pp 188I–189A); *Karpal Singh & Anor v PP* [1991] 2 MLJ 544 followed.

(4) The basis of the non-adherence of the orders for the prosecution to supply the documents were never complied with in accordance with s 51 of the Code. No summons was issued by the court, thus rejecting any notion that the magistrate could have considered judicially the production of the documents for purposes of the trial. Even if the provision of s 51 of the Code had been complied with by the magistrate, the non-cooperation by the prosecution did not empower or entitle him to pronounce that relevant order (see p 192F–G).

[Bahasa Malaysia summary

Tertuduh telah meminta pelepasan tidak bererti pembebasan atas dasar bahawa pihak polis tidak membekalkannya dengan dokumen seperti mana diarah oleh mahkamah. Ia tidak dipertikaikan bahawa pegawai mendakwa telah meminta penundaan di atas helah memberinya masa untuk membekal dokumen-dokumen. Majistret tersebut telah setuju dengan permintaan tertuduh. Isu di hadapan mahkamah adalah sama ada di bawah Kanun Acara Jenayah (NMB Bab 6) ('Kanun tersebut'), atau di bawah sebarang undang-undang yang diamalkan, majistret tersebut boleh melepaskan seorang tertuduh tidak bererti pembebasan dalam membalas ketidakpatuhan kepada arahan mahkamah yang spesifik oleh pendakwa, walaupun tidak terdapat sebarang tanda oleh beliau yang beliau tidak berminat untuk meneruskan perkara tersebut.

Diputuskan, mengetepikan arahan majistret dan menghidupkan semula kes tersebut:

(1) Di bawah s 173(g) Kanun tersebut, mahkamah boleh mengenakan arahan pelepasan tidak bererti pembebasan jikalau ia menganggap pertuduhan tersebut tidak berdasar. Dalam kes semasa, pegawai mendakwa tidak memberitahu mahkamah bahawa beliau tidak berminat untuk meneruskan kes tersebut; juga tidak terdapat keterangan menunjukkan bahawa pertuduhan tersebut tidak berdasar. Apabila penundaan diminta oleh Pendakwa Raya, tanpa beliau memberi tanda bahawa pertuduhan tersebut tidak berdasar atau tidak berminat untuk meneruskan perkara tersebut, permohonan tersebut patut dibenarkan. Dalam senario ini, suatu arahan pelepasan tidak bererti pembebasan bukanlah suatu arahan alternatif (lihat ms 186G dan 184E).

(2) Perkara 145(3) Perlembagaan Persekutuan memberi kuasa kepada Peguam Negara yang boleh digunakan mengikut budi bicaranya, untuk memulakan, menjalankan atau memberhentikan sebarang prosiding untuk satu kesalahan. Perkara 145(3) adalah eksplisit dan muktamad dalam memberi kuasa yang relevan kepada Peguam Negara dan ia adalah tidak munasabah untuk

menganggap bahawa majistret boleh dengan acuh tak acuh mengetepikan kuasa berperlembagaan Peguam Negara (lihat ms 183A, 191C dan 192E).

(3) Seorang majistret tidak mempunyai kuasa sedia ada untuk melepaskan seorang tertuduh tidak bereti pembebasan. Doktrin Inggeris kuasa sedia ada tidak terpakai di mahkamah rendah Malaysia (lihat ms 188I–189A); *Karpal Singh & Anor v PP* [1991] 2 MLJ 544 diikut.

(4) Dasar untuk ketidakpatuhan kepada arahan-arahan untuk pendakwa membekalkan dokumen-dokumen tidak dipatuhi mengikut s 51 Kanun tersebut. Tiada saman dikeluarkan oleh mahkamah, oleh itu menolak tanggapan bahawa majistret boleh membuat pertimbangan kehakiman pengeluaran dokumen-dokumen untuk tujuan perbicaraan tersebut. Walaupun peruntukan s 51 Kanun tersebut telah dipatuhi oleh majistret, ketidakkerjasamaan oleh pendakwa tidak memberinya kuasa atau hak untuk memberi arahan relevan tersebut (lihat ms 192F–G).]

Notes

For cases on discharge of accused not amounting to acquittal, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 85–86.

Cases referred to

Bidya Chaudhary v Province of Bihar AIR 1950 Pat 19 (refd)
Choo Yoke Choy v PP [1992] 2 MLJ 632 (refd)
Chu Chee Peng v PP [1973] 2 MLJ 35 (refd)
Datuk (Datu) Amir Kahar bin Tun Hj Mustapha v Tun Mohd Said bin Keruak & Ors [1994] 3 MLJ 737 (refd)
Karpal Singh & Anor v PP [1991] 2 MLJ 544 (folld)
Koh Teck Chai v PP [1968] 1 MLJ 166 (refd)
Kuppusamy v PP [1948] MLJ 25 (refd)
Lloyds Bank Ltd, Re (1934) 35 Cr LJ 1028 (refd)
Long bin Samat & Ors v PP [1974] 2 MLJ 152 (refd)
Muhammad Ibrahim Hj Moula Baksh v TCH Naughton & Ors AIR 1941 Sind 198 (refd)
Muhammed Sheriff Sahib v Abdul Karim Sahib (1928) Cr LJ 927 (refd)
PP v Hettiarachigae LS Perera [1977] 1 MLJ 12 (refd)
PP v Hon Jiew Criminal Revision No KG2 of 1994 (II) High Court, Kuching, unreported (refd)
PP v Karumah [1980] 2 MLJ 102 (refd)
PP v Khoo Kay Jin [1973] 1 MLJ 259 (refd)
PP v Mat Radi [1982] 1 MLJ 221 (refd)
PP v Mat Zain bin Yahya [1949] MLJ 148 (refd)
PP v Raymond Chia Kim Chwee & Anor [1985] 2 MLJ 63 (refd)
PP v Raymond Chia Kim Chwee & Anor; Zainal bin Hj Ali v PP [1985] 2 MLJ 436 (refd)

PP v Suppiah Pather Penang Criminal Revision No 14 of 1951, unreported (refd) A
PP v Syed Abdul Bahari Shahabuddin [1976] 1 MLJ 87 (refd)
PP v Zainuddin & Anor [1986] 2 MLJ 100 (refd)
R v Pratt ILR 47 Cal 647 (refd)
Smedleys Ltd v Breed [1974] 2 All ER 21 (refd)
State of Bihar, The v Ram Naresh (1957) Cr LJ 567 (refd) B
Tan Ah Chan v R [1955] MLJ 218 (refd)
Tan Foo Su v PP [1967] 2 MLJ 19 (refd)
Tai Chai Keh v PP [1948–49] MLJ Supp 105 (refd)

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Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 51, 60, 173(f), (g), 254, 376
Evidence Act 1950 s 114
Federal Constitution art 145(3)
Penal Code (FMS Cap 45) s 175 D
Road Transport Act 1987 s 41(1)
Subordinate Courts Act 1948 s 76

Maziah bte Abu (State Legal Adviser's Chambers) for the prosecutor.
AC Vohrah (*Vohrah & Tan Chee Lan*) for the complainant.

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Suriyadi J: The High Court received a letter dated 28 March 1998 requesting me to call up Jasin Magistrates' Court Summons Case No 83–36–97 for revision. In brief, the letter stated that the accused was charged under s 41(1) of the Road Transport Act 1987 (Act 333/87) and the matter had come up for hearing a couple of times but adjourned on the F ground that the police did not supply the accused with the relevant documents. On 23 March 1998, when the case came up again before the learned magistrate, the accused requested for a discharge not amounting to an acquittal on the specific ground that the police had not supplied him the documents as ordered by the court. The learned magistrate acquiesced to that request. G

Having detected a probable mistake committed by the learned magistrate I ordered the file to be placed before me and on 20 April 1998 enquired into the matter in open court. Having perused the notes of the proceeding, I concluded that on one occasion the case was postponed as the court was without an interpreter, twice by reason of the default of the H accused's counsel, and twice due to the inability of the prosecution to supply the documents to the accused as ordered by the court. In brief, everyone had a hand in the delay and the postponements which eventually led to the order. This order was pronounced inspite of the explanation of the prosecuting officer that the inability to supply the documents was due to administrative problems which was at that moment besetting the local I constabulary.

With the facts clarified, what is left is the legal issue at hand, ie whether under the Criminal Procedure Code (FMS Cap 6), or under any

prevailing law, the magistrate may discharge an accused person not amounting to an acquittal, in response to the non-adherence of the court's specific instruction by the prosecution, even though there was no indication by the latter of not being interested in pursuing the matter further.

The Federal Constitution which is the supreme law of this land, and of which, statutory law must yield to, is enshrined art 145(3) which provides the Attorney General with power exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court martial. Lord Suffian LP in *Long bin Samat & Ors v PP* [1974] 2 MLJ 152 had occasion to say when touching on this article at p 158 para A (right):

> In our view, this clause from the supreme law clearly gives the Attorney General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue.

Under s 376 of the Criminal Procedure Code (FMS Cap 6) is contained the provision which reads that the Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code. Magistrates who are partners in the machinery of justice are similarly clothed with the relevant powers and authority, for purposes of carrying out their duties, in particular under the Subordinate Courts Act 1948 (see s 76). For the conduct of criminal cases, the magistrate observes the procedures laid down in the Criminal Procedure Code (FMS Cap 6). The Code which deals with the law of procedure, and which is required to be adhered to in every matter pertaining the general administration of criminal law in this country, provides the machinery for the punishment of offences against substantive criminal law. The machinery devised within the Code is created for justice and anything that derogates from it must be rejected. Putting the two institutions together, it is incontrovertible that the powers of the Attorney General emanate direct from the Constitution whilst for the magistracy the sources are the other relevant statutes. Without going overboard, it is trite that the provisions of the Constitution hold sway over any other laws (see *Datuk (Datu) Amir Kahar bin Tun Hj Mustapha v Tun Mohd Said bin Keruak & Ors* [1994] 3 MLJ 737 where even constitutional conventions could not override the express provisions of the Sabah Constitution). NS Bindra in *The Interpretation of Statutes* in no uncertain terms said:

> The Constitution is the very framework of the body policy: its life and soul; it is the fountain-head of all its authority, the main spring of all its strength and power. The Executive, the Legislature, and the Judiciary are all its creation, and derive their sustenance from it. ... . While the Constitution is the direct mandate of the people themselves, the statute is an expression of the will of the Legislature only, though the Legislature is also the representative of the people. A Constitution is but a higher form of statutory law ... .
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> A written Constitution is to be interpreted and effect given to it as a paramount law to which all other laws must yield.

Due to possible overlapping and inter-encroachments of jurisdiction by the judiciary and the prosecution, in the grey areas, hiccups have occured in the interpretation of each other's rights. Due to this misunderstanding leading to incursions into each other's territory, two views have mushroomed, namely:

(1) unless there are good grounds to the contrary, the discharge of an accused person should amount to an acquittal (see *PP v Suppiah Pather* Penang Criminal Revision No 14 of 1951; *PP v Mat Zain bin Yahya* [1949] MLJ 148; *Tan Ah Chan v R* [1955] MLJ 218; *Tai Chai Keh v PP* [1948–49] MLJ Supp 105; *Choo Yoke Choy v PP* [1992] 2 MLJ 632). This view seemed to have met with disapprovals and cannot be said to be the correct expression of the law; and

(2) the other being that the discharge should not amount to an acquittal if unnecessary postponement are requested for by the Public Prosecutor so long as he is still interested in prosecuting the accused.

As regards the first view it is now established that an acquittal can only follow if the prosecution does not desire to pursue the matter further (s 254 of the Criminal Procedure Code; *PP v Syed Abdul Bahari Shahabuddin* [1976] 1 MLJ 87; *Koh Teck Chai v PP* [1968] 1 MLJ 166; *Kuppusamy v PP* [1948] MLJ 25); as for the second view, the above statement seemed to be the current established law. Inspite of the clarity of the matter, another view which is not without foundation, and respected ('the third view') is that when a postponement by the Public Prosecutor is requested, without the latter hinting that the charge is groundless or is disinterested in pursuing the case further, the application should be allowed. In this scenario an order of discharge not amounting to an acquittal is not an alternative order.

To pronounce either an order of discharge amounting to an acquittal, or discharge not amounting to an acquittal which is not in accordance with the requirements of the law, would tantamount to ultra vires the Constitution and the Code. As early as 1924 in the case of *PP v Mrs ET Wright and another application* (1924) FMSLR 16, it was already recognized that an act of a magistrate is ultra vires the law if it permitted certain acts which were outside its power. In that case, Reay JC with regard to the compounding of a case not properly carried out pursuant to the provisions of the law opined that (at p 20):

> ... It is, of course, not competent for a magistrate to permit the composition of a non-compoundable offence on any ground whatever. Even should the accused wish for a compromise and the magistrate considers it better for him and even if it is probable that the case will turn out to be compoundable, his consent is nevertheless ultra vires.

Some recent examples of cases that have met with disapprovals when the learned magistrate undertook to discharge the cases not amounting to an acquittal are, inter alia:

(1) *PP v Karumah* [1980] 2 MLJ 102 where the Public Prosecutor requested for a postponement even though the investigation had

A been completed. The magistrate refused the postponement even though he possessed an unfettered discretion to adjourn a criminal case where witnesses are absent or for any other reasonable cause (*Tan Foo Su v PP* [1967] 2 MLJ 19; *PP v Khoo Kay Jin* [1973] 1 MLJ 259; *PP v Hettiarachigae LS Perera* [1977] 1 MLJ 12);

B (2) *PP v Mat Radi* [1982] 1 MLJ 221 where a Deputy Public Prosecutor was not present inspite of being persistently requested by the magistrate; and

(3) *PP v Hon Jiew* Criminal Revision No KG2 of 1994 (II) High Court, Kuching, the prosecution failed to obey the court's instruction to refer the file to the Deputy Public Prosecutor.

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A reading of these cases produces an impression that the relevant magistrates succumbed to their annoyance and frustrations when confronted by a lack of preparation or refusal by the police or prosecution to adhere to their instructions and hence discharging the accused not amounting to an acquittal. To succumb to emotion surely is not the hallmark of impartiality and strength expected of a judge. In the words of Salleh Abas LP, pertaining to judges being subject to emotions, in *PP v Zainuddin & Anor* [1986] 2 MLJ 100 (at p 103):

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> ... It should not be ordered as an expression of anger and exasperation at or as a censure against the conduct of the prosecution.

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To understand the third view, a comprehensive appreciation of its approach is relevant, and hence my subsequent write-up. In pursuit of that objective of understanding this view, in my research, I began by scanning the Criminal Procedure Code and eventually narrowed down to ss 254 and 173(g), where a court could pronounce the order of a discharge, although the connotation of discharge differ in them. Even though the word 'discharge' is not defined in the Malaysian Criminal Procedure Code, it is obvious that it is used in relation to different sets of circumstances or situation, whereby the conclusion or effect is not identical in relation to those different circumstances. This is so as it must be recognized that the meaning of 'discharge' in ss 173(g) and 254 are at variance by virtue of their different purpose in the Code.

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Discharge under s 254 of the Code

It must be borne in mind that a discharge under s 254 cannot be equated with a discharge under s 173(g) of the Criminal Procedure Code as the latter section envisages a situation where it is used in the sense of an accusation or allegation of an offence. Jagannadhadas J in *The State of Bihar v Ram Naresh* (1957) Cr LJ 567 at p 571 when discussing s 494 of the old Indian Criminal Procedure Code which corresponds with our s 254 said:

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> For instance the discharge that results therefrom need not always conform to the standard of '*no prima facie case*' ... or of 'groundlessness' under section ... 253(2) Criminal PC (corresponds to s 173(g) of the Malaysian Criminal Procedure Code). (Emphasis added.)

Under s 254, at any stage of any trial before the delivery of any judgment, the Public Prosecutor may inform the court that he will not further prosecute the charge and thereupon the accused shall be acquitted. In other words there is no necessity for the magistrate to consider further as to the viability of the charge but merely to acquit and discharge the accused after being informed. Under this provision, unlike that of s 173(f), the evidence is yet to be heard or adduced by the prosecution. Where the proposal of not continuing with the prosecution comes from the prosecuting officer, leave must first be obtained from the court. This difference of approach is perhaps due to the desire of Parliament to permit the court to satisfy itself that the executive function of the Public Prosecutor has not been improperly exercised or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purpose by the latter's prosecutors (*The State of Bihar v Ram Naresh* (1957) Cr LJ 567).

Under this provision, such discharge shall not amount to an acquittal unless the court so directs. In other words, for him to be recorded to have been acquitted, it must be pursuant to the pro-active act of the learned magistrate who must so specify the details. Notwithstanding this supposed room given to the magistrate, it is quite established that whenever the prosecution has indicated to the court that it is not interested in pursuing the matter, the court then shall acquit the accused.

Discharge under s 173(g) of the Code

Section 173(g) has a different purpose and carries a different message. It reads:

> Nothing in paragraph (f) shall be deemed to prevent the Court from discharging the accused at any previous stage of the case if for reasons to be recorded by the Court it considers the charge to be groundless.

I need not explain in detail as to the historical development of the law with regard to the above provision, but suffice if I state that, if invoked, the court can only issue a discharge not amounting to an acquittal order. It is not given the same treatment as ss 254 and 173(f) of the Code.

In contradistinction to s 254, under s 173(g) of the Code the court is still left with some room to manoeuver, in that the court may mete out the order of discharge not amounting to an acquittal if it considers the charge to be groundless. But when is a charge groundless? Davis CJ in *Muhammad Ibrahim Hj Moula Baksh v TCH Naughton & Ors* AIR 1941 Sind 198 at p 201 had this to say :

> I take it, the word 'groundless' in sub-s (2) of s 253 Criminal PC, means when there are no good grounds for the charge.

A word of caution is that a finding of no prima facie case has been made out cannot be equated with the assertion that the charge is groundless (see Sohoni's *The Code of Criminal Procedure* (16th Ed, Vol II). Wallace J in *Muhammed Sheriff Sahib v Abdul Karim Sahib* (1928) Cr LJ 927 at p 995 clearly said:

A I do not agree with the sessions judge in his revision order that to say no case is made out is tantamount to saying the charge is groundless.

I am quite satisfied that under s 173(g) a discharge not amounting to an acquittal may be pronounced where the charge appears to be so groundless ab initio, or can be found to have no good grounds. In fact even after some B witnesses have been examined and it would appear that the examination of the remaining witnesses for the prosecution will not materially assist the prosecution, the judge may discharge the accused not amounting to an acquittal. It would follow therefore that, when a charge is groundless ab initio, it must mean that the basis is clearly insufficient to meet the minimum requirement of the accusation.

C After perusing this provision of s 173(g), I have to conclude that if the issue of the charge is not being put to the test, then there is therefore no necessity for the magistrate's mind to be directed to it. What is meant here is a scenario where the prosecution, who is interested in pursuing the matter and indisputably has completed the investigation, wishes a D postponement on some good grounds. In that situation, the charge is not in issue or being subject to some test of whether it is groundless or otherwise, but merely a rider to the postponement application. Under s 114 in particular illustration (e) of the Evidence Act 1950, the court may presume the existence of any fact which it thinks likely to happen, regard being had to public business that the act performed, in this case an official E act, had been regularly performed. Therefore at that stage it must be deemed that the Public Prosecutor had sufficient evidence to proceed with the case as otherwise he would not have charged the accused.

Discharges under s 173(f) of the Code

F For completeness I find it necessary to discuss s 173(f) of the Criminal Procedure Code. Under this provision an accused person may be acquitted at the end of the prosecution's case when the court considers that no prima facie case has been made out. This provision requires a scenario where 'the prosecution is concluded' which implies that evidence has been submitted G by the prosecution and who later closes the case. It goes without saying that when the prosecution offers no further evidence at any stage of its case it means that he also has concluded his case. Whether the case is concluded because the prosecution has finished adducing all its relevant evidence or because of frustration, or for some other reason is of no concern to the H learned magistrate. As far as he is concerned the prosecution's case is concluded, and with the ball now in his court, all that is required of him is to carry out his judicial duties and decide whether a prima facie case has been made out or not (*Chu Chee Peng v PP* [1973] 2 MLJ 35; *PP v Zainuddin & Anor* [1986] 2 MLJ 100). Here he is discharged amounting to an acquittal if a prima facie case has not been made out by the I prosecution.

When can the magistrate pronounce an order of discharge not amounting to an acquittal

With all those factors shackling the powers of the magistrate, when then can he pronounce an order of discharge not amounting to an acquittal, under s 173(g) of the Code? The answer, I believe, will depend on the facts of each case, as it is improbable that this subsection was promulgated by Parliament for no reason at all. A hypothetical situation that may permit the court to issue that order is when a request for postponement is made on the pretext that the investigation is yet to be completed. On those set of facts, the learned magistrate may consider the charge as being groundless and pronounce that order, as it is quite absurd for an accused person to be charged even before the Deputy Public Prosecutor is informed. It is no secret that, administratively, only after an investigation has been completed will the Deputy Public Prosecutor be informed. Even if the latter were to assume responsibility over the file, especially for serious cases, no self-respecting Deputy Public Prosecutor will charge a person unless the investigation is considered complete. It is only at the end of the investigation that the executive action is determined. By then a clearer picture of the case would have been assembled. To return to the hypothetical situation, the assertion that the investigation is incomplete surely would tantamount to an admission that the charge is groundless, thus supplying the pretext for the court to conclude so. Even though the prosecution may argue that the remark is meant to mean that time was required merely to tie up the loose ends, the learned magistrate is entitled to give the benefit of the doubt to the accused. It is trite that whenever there are two inferences or interpretations, the one that is most favourable to the accused must be accorded to him for his benefit. On that score the court may, pursuant to s 173(g), pronounce the order of discharge not amounting to an acquittal on the judicial finding that the charge is groundless.

Current case scenario

Reverting to the present case, it was not disputed that the prosecuting officer had asked for a postponement on the pretext of giving him time to supply the documents as ordered by the court. Never did the officer inform the court that he was not interested in pursuing the case nor is there any evidence made available from the notes of proceeding to show that the charge was groundless. Following the above or prognosis of the law, the learned magistrate should have merely postponed the case. That is what is meant by the third view as mentioned much earlier above.

Perusing the law further, with the magistrate being subservient to the superior constitutional powers of the Attorney General with regard to its inability to discharge an accused not amounting to an acquittal, compounded by all the above discussed reasons, a legal issue worth considering is whether the learned magistrate has the inherent powers to do so. At the outset the answer is in the negative. This issue was clearly resolved by the case of *Karpal Singh & Anor v PP* [1991] 2 MLJ 544 when Abdul Hamid Omar LP in no uncertain terms said that the English

A doctrine of inherent jurisdiction is inapplicable in Malaysian subordinate courts. His Lordship at p 549 para C (left) said:

> ... Our considered opinion is that the English doctrine of inherent jurisdiction is hardly applicable in the subordinate courts but the High Court may invoke such prerogative powers in rare instances where it is right to do
B justice to the accused. ... . There is hardly any room for transplantation of any English practice or other systems of law in the magistrate's court under the Code. ...
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> In matters like criminal law of a purely domestic nature, our view is that the court will only exercise its inherent powers when there is miscarriage of justice. The court must be careful that the decision is not in conflict with
C the intention of the legislature as indicated in statutory powers.

With such a scenario painted, rendering a magistrate near toothless, apart from postponing the case, what can this magistrate do after his instruction to supply the documents to the accused had been ignored? In fact, this matter was profusely argued by the learned counsel for the accused who
D attempted to justify the learned magistrate's order. As the issue of documents have been the basis of that order, s 51 of the Criminal Procedure Code has taken prominence and it is thus encumbent upon me to discuss this matter in some depth. This section reads:

> (1) Whenever any Court or police officer making a police investigation
E considers that the production of any property or document is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer such Court may issue a summons or such officer a written order to the person in whose possession or power such property or document is believed to be requiring him to attend and produce it or to produce it
F at the time and place stated in the summons or order.

At the outset, it is crystal clear that the learned magistrate will not be able to justify the ordering of the supply of those documents unless the above provisions had been complied with stringently. Full compliance of this section entails:

G (1) the court having considered the production of any document being necessary or desirable for a trial (*R v Pratt* ILR 47 Cal 647). This entails some thinking over with the discretion being exercised judicially by the judge even though the issue of admissibility of the document is yet to be resolved (*Re Lloyds Bank Ltd* (1934) 35 Cr LJ 1028);

H (2) the document or documents being reasonably regarded as forming part of the evidence in the case (*Re Lloyds Bank Ltd* at p 1030 right hand column);

(3) the trial being related to proceedings under the Criminal Procedure Code;

I (4) the court having issued a summons to back up that order to produce;

(5) the court believing that the document is in the possession of a particular person; and

(6) the summons is issued in the name of the person who is in possession of that document and required to produce.

Looking at the above pre-conditions, it is conspicuous that s 51 has a specific purpose, with the primary object being the production of anything that may reasonably be regarded as forming part of the evidence in a case. Narrowing further the applicability of the provision, Hepworth J in *PP v Teoh Choon Teck* [1963] MLJ 34, had occasion to say (at p 36):

> ... A general direction to produce all papers relating to the subject in dispute will not be enforced. It must be directed at a specific document.

Perusing and construing this provision, I am satisfied that the jurisdiction of this section merely carries with it the right of inspection and no more. Hepworth J in the same case in succinct terms was of the same view when he stated:

> ... It does not, however, give the court jurisdiction to order the prosecution to supply an accused person with photostat copies of those documents.

On the issue of the format of the application, Mohd Azmi J (as he then was) in no uncertain terms in *PP v Raymond Chia Kim Chwee & Anor* [1985] 2 MLJ 63 at p 65, confirmed that that provision envisaged a summons to be issued by the court. That summons is good against any person, including the Public Prosecutor to produce specified documents which the court consider necessary or desirable for any of the purposes applied for. This case later went up to the Federal Court vide a reference in *PP v Raymond Chia Kim Chwee & Anor; Zainal bin Hj Ali v PP* [1985] 2 MLJ 436. Even though the Federal Court ruled that the order of the learned judge to produce the documents was not a proper exercise of his revisionary powers, the statements of law uttered by Mohd Azmi J remained unaffected and respectable. With regard to this relevant provision, the Federal Court confirmed that the right of a person to ask for a document or material in a criminal proceeding under s 51 of the Criminal Procedure Code is a right exercisable at the discretion of the court. The instruction must be in the form of a summons and may be made before the commencement or in the course of a trial.

Taking one step further, I am convinced that even had the learned magistrate complied with every element in that provision and issued a summons, it would still not justify his order even if the contents were not complied with by the Public Prosecutor. The non-compliance of a summons issued by a magistrate, and a discharge not amounting to an acquittal order by virtue of the charge being groundless are two distinctly separate legal animals. They are substantive legal matters deserving entirely separate legal treatments and remedy. The non-compliance may warrant a contempt proceeding, a search warrant (s 60 of the Criminal Procedure Code) or even a charge under s 175 of the Penal Code (Act 574) (FMS Cap 45) but certainly not the denial of the Public Prosecutor's powers by undoing his meticulous work. The presiding magistrate must bear in mind that prior to the Public Prosecutor approving and preferring a charge against a particular person, he must have deliberated on all the available facts and factors within his purview and knowledge. It would be an outrage if a court were to nullify the act of the Public Prosecutor merely based on some invalid ground fuelled by ill-concealed exasperation. As an infringement of the

A Attorney General's authority has occurred, it therefore becomes necessary for me to look into the relevant instruments. It is an established duty of the court that whenever a power has been granted by a constitutional instrument, and such power has been challenged, it is therefore encumbent upon the court to scrutinize the words of that instrument and decipher whether such a power does exist. I merely need to regurgitate the statement of law provided in the case of *Bidya Chaudhary v Province of Bihar* AIR 1950 Pat 19 which reads:

> When, therefore, a right or power is challenged, the duty of the court is to keep close to the words of the constitutional instrument, and see first whether the power is granted, and secondly, whether there is anything else which restricts the rights so granted. If the text is explicit, the text is conclusive, alike in what it directs and in what it forbids.

After sufficient research I am satisfied that art 145(3) is explicit and conclusive in conferring the relevant powers to the Attorney General.

Needless to say, if any substantive pre-requisite of s 51 of the Criminal Procedure Code is not complied with, then such discharge order would not deserve any kind words. It is an undeniable fact that, as seen from the notes of proceeding of the current case, no summons was issued by the court, thus rejecting any notion that the learned magistrate could have considered judicially the production of the documents for purposes of the trial. In other words, the order of the magistrate was without any legal foundation and had been pronounced in a vacuum.

What then should this relevant magistrate have done? Reading *PP v Karumah* and *PP v Tan Kim San* [1980] 2 MLJ 98, the answer is resoundingly clear in that that prosecuting officer's application should have been granted. To complement this course of action, administratively, it would have been a positive step had the local Deputy Public Prosecutor been informed of the poor state of affairs that was prevailing in the relevant prosecutor's office vis-a-vis matters within his purview. The Supreme Court in *PP v Zainuddin & Anor* [1986] 2 MLJ 100 at p 103 suggested in certain situations that:

> ... Perhaps, a short adjournment or a last adjournment should be granted so as to enable the prosecution to make up its mind one way or the other. It might well be that in the end the prosecution may decide to discontinue. Thus, the co-operation and mutual respect between the bench and the bar in the administration of justice is so important that it should not be undermined.

In *Karpal Singh & Anor v PP* [1991] 2 MLJ 544, the Supreme Court went one step further at pp 548 para H (right) when it said:

> ... If any party feels that the charge and consequent proceedings are illegal on the face of the record, which we feel is rare, his remedy is to take up appropriate proceedings before a High Court to quash the charge and the whole proceedings producing evidence to the satisfaction of the trial judge to adopt such a case. It is absurd and against common sense to believe that the legislature ever expected members of subordinate judiciary to exercise such vast powers, trespassing into the Public Prosecutor's area.

In the case of *PP v Karumah* [1980] 1 MLJ 102, the court there similarly suggested that an adjournment should have been granted as a discharge not amounting to an acquittal order would only have resulted in other unexpected negative results. In the same vein as *PP v Tan Kim San*, the court further advised magistrates to report the matter to the Public Prosecutor, who — being a responsible person — would do the needful and take the correct course of action. One must be mindful of his ability to react correctly when the situation warrants it especially when the public interest is at stake. It is nonsensical and also never the rule of law that a prosecution will automatically ensue the moment a criminal offence is detected, as, apart from the necessity of the case being evidentially viable, other relevant considerations, eg issue of costs, backlogs and other factors may be required looking into (*Smedleys Ltd v Breed* [1974] 2 All ER 21). Suffian LP in *Long bin Samat & Ors v PP* [1974] 2 MLJ 152 in all his simplicity also echoed the same view when he said (at p 158):

> ... It is also well known that the Public Prosecutor takes into account, and rightly so, the state of the backlog in the different courts in the country ... .

To conclude on the matter at hand, there was no justification for the learned magistrate to issue the order of discharge not amounting to an acquittal, in the circumstances of the case when:

(1) there was nothing to show that the charge was groundless (s 173(g));

(2) it is absurd to think that he could nonchalantly brush aside the constitutional powers of the Attorney General conferred under art 145(3) of the Federal Constitution;

(3) he possessed no inherent powers similar to that of subordinate courts in England;

(4) the basis of the non-adherence of the orders for the prosecution to supply the documents were never compiled with in accordance with s 51 of the Criminal Procedure Code. Even if the provision of s 51 of the Code had been complied with by the learned magistrate, that non-cooperation by the prosecution did not empower or entitle him to pronounce that relevant order;

(5) there was no indication that the Public Prosecutor agreed to his act; and

(6) there was absolutely no valid reason recorded in the notes of proceeding as to the basis of his order.

In the circumstances of the case, the learned magistrate should have postponed the case as he was rich in the grounds towards that direction and short in valid grounds for the discharge order. By virtue of the above reasons, I had no hesitation in setting aside the court's order below and reinstate the case before him.

Order accordingly.

Reported by Jafisah Jaafar